

Fixing the Holes in the Endangered Species Act

*Alison Adkins**

I. INTRODUCTION

In 1973, the Endangered Species Act (“ESA”) was signed into law.¹ This piece of legislation came at a time of heightened environmental concern following a decade which had seen an increase in public activism on a variety of issues.² The Endangered Species Act was in part a result of this activism, but its roots reach further back in history.³ Starting with the Lacey Act of 1900, which prohibited the taking and hunting of certain species, the federal government began to participate in conservation actions.⁴ These protections were strengthened with the Migratory Bird Act of 1918, the Bald Eagle and Golden Eagle Protection Act of 1940, the Endangered Species Protection Act of 1966, and the Marine Mammal Protection Act of 1972.⁵ The Endangered Species Act combined and expanded the protections these prior acts had created for species threatened with extinction.⁶

The Endangered Species Act has undergone several changes in the almost fifty years since its enactment.⁷ The first major set of amendments came in 1978.⁸ This set of amendments allowed cabinet-level officials to permit actions that will jeopardize

* Senior Staff Editor of the KY. J. EQUINE, AGRIC., & NAT. RES. L.; B.A. Political Science, 2014, Georgetown University; J.D. May 2022, University of Kentucky J. David Rosenberg College of Law.

¹ Cynthia F. Hodges, *Brief Summary of the Endangered Species Act (ESA)*, ANIMAL LEGAL & HIST. CTR. (2010), <https://www.animallaw.info/article/brief-summary-endangered-species-act> [<https://perma.cc/E96M-GF7K>].

² Denise Chow, *Earth Day at 50: Why the Legacy of the 1970's Environmental Movement is in Jeopardy*, NBC NEWS (Apr. 22, 2020), <https://www.nbcnews.com/science/environment/earth-day-50-why-legacy-1970s-environmental-movement-jeopardy-n1189506> [<https://perma.cc/DBL3-ZG5P>].

³ BALLOTPEdia, *History of the Endangered Species Act*, https://ballotpedia.org/History_of_the_Endangered_Species_Act (last viewed 2020) [<https://perma.cc/N75Q-W3E5>].

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ U.S. FISH & WILDLIFE SERV. *Endangered Species Act, A History of the Endangered Species Act of 1973, 1978 ESA Amendment* (Jan. 30, 2020), <https://www.fws.gov/endangered/laws-policies/esa-1978.html> [<https://perma.cc/4XBC-T7D4>].

some species, and required critical habitats to be designated alongside the species being listed.⁹ The 1982 amendment required the determination of a species' status within one year of its proposal unless withdrawn for cause, and also required listing determinations to be made solely on the basis of biological and trade information—without consideration of possible economic or other effects.¹⁰ The 1988 amendment required monitoring of “candidate” and “recovered” species, and adopted an emergency listing procedure species facing significant risks.¹¹ Lastly, the 2004 amendment exempted the Department of Defense from critical habitat designations.¹² This amendment gives the Department more leeway in projects that imperil habitats deemed critical for threatened or endangered species.¹³ An amendment to the Endangered Species Act was recently proposed in the Senate that would require the consent of the governor of each state to implement conservation plans.¹⁴

The Endangered Species Act is credited with saving many different species of wildlife.¹⁵ Some species preserved through the Act include: the American Alligator, Brown Pelican, and Green Sea Turtle.¹⁶ Perhaps the most well-known success, the Bald Eagle, was listed as endangered in the forty-eight contiguous states in 1978 and was officially delisted in 2007.¹⁷ These recoveries provide

⁹ *Id.*

¹⁰ U.S. FISH & WILDLIFE SERV. *Endangered Species Act, A History of the Endangered Species Act of 1973, 1982 ESA Amendment* (Jan. 30, 2020), <https://www.fws.gov/endangered/laws-policies/esa-1982.html> [<https://perma.cc/RJP9-5JUF>].

¹¹ U.S. FISH & WILDLIFE SERV. *Endangered Species Act, A History of the Endangered Species Act of 1973, 1988 ESA Amendment* (Jan. 30, 2020), <https://www.fws.gov/endangered/laws-policies/esa-1988.html> [<https://perma.cc/E2WX-2LLS>].

¹² U.S. FISH & WILDLIFE SERV. *Endangered Species Act, A History of the Endangered Species Act of 1973, 2004 ESA Amendment* (Jan. 30, 2020), <https://www.fws.gov/endangered/laws-policies/esa-2004.html> [<https://perma.cc/4WKR-BJFQ>].

¹³ *Id.*

¹⁴ Rand Paul, *Endangered Species Management Self-Determination Act*, CONGRESS.GOV (July 30, 2019), <https://www.congress.gov/bill/116th-congress/senate-bill/2343/text> [<https://perma.cc/Z9MH-99B3>].

¹⁵ Laura Beans, *10 Success Stories Thanks to the Endangered Species Act*, ECOWATCH (Dec. 07, 2013), <https://www.ecowatch.com/10-success-stories-thanks-to-the-endangered-species-act-1881837279.html> [<https://perma.cc/2FXR-E47A>].

¹⁶ *Id.*

¹⁷ Rebecca Heisman, *Bald Eagle, The Ultimate Endangered Species Act Success Story*, AM. BIRD CONSERVANCY (May 24, 2018), <https://abcbirds.org/bald-eagle-the-ultimate-endangered-species-act-success-story/> [<https://perma.cc/UJ3D-JQ37>].

evidence that the Endangered Species Act is an important tool in environmental conservation in the United States.

Even with these successes, the Endangered Species Act has faced and continues to face many criticisms. Criticism of the Act includes claims that the act has not gone far enough to protect imperiled species and that the Act is an example of government overreach.¹⁸ Those who say the Act does not go far enough in protecting species argue that while the Act has been successful in preventing the extinction of species, it has not been as successful in promoting the recovery of those species.¹⁹ Those who claim that the Act is government overreach argue that it should consider the economic costs of protecting species because the Act currently inflicts too much harm upon the economic interests of business owners²⁰

There are three main paths forward for the Endangered Species Act: (1) reforming the Act federally through amendments to the legislation, (2) reforming the Act through state-level action and supplemental legislation, or (3) leaving the current legislative framework as is. Leaving the legislative framework as is, the least appealing option, would simply ignore the criticisms currently directed at the Endangered Species Act and will not help people or animals impacted by the regulations created by the Endangered Species Act.

Initially, changing legislation at the federal level seems like the most appealing path forward for fixing the issues associated with the Endangered Species Act. Changing existing legislation can be more efficient than creating a completely new regulatory scheme and previous amendments to the act have addressed concerns both proponents and opponents of the act have had.²¹ Acting at the federal level also preserves the unity of regulation which can benefit species whose habitats expand across multiple

¹⁸ Matt Kettman, *Why the Endangered Species Act is Broken and How to Fix it*, SMITHSONIAN MAG. (May 15, 2013), <https://www.smithsonianmag.com/innovation/why-the-endangered-species-act-is-broken-and-how-to-fix-it-63482436/> [https://perma.cc/NRK9-6S7P].

¹⁹ *Id.*

²⁰ Paul, *supra* note 14.

²¹ *See* U.S. FISH & WILDLIFE SERV., *supra* note 8 (explaining that the ESA has undergone several changes in the fifty years since its enactment). *See also* U.S. FISH & WILDLIFE SERV., *supra* note 10 (describing the changes enacted by the 1982 Amendment ESA); *see also* U.S. FISH & WILDLIFE SERV., *supra* note 11 (describing the changes enacted by 1988 Amendment to the ESA); *see also* U.S. FISH & WILDLIFE SERV., *supra* note 12 (describing the changes enacted by the 2004 Amendment to the ESA).

states, as a base level of protection is maintained throughout the country. However, federal regulations can struggle to address specific, local problems as they must be less targeted and more generally applicable. Expanding federal environmental protections is also increasingly difficult, as the current trend is to create less stringent environmental regulations at the federal level.²² Thus, it is clear that using federal regulations is not the best method of addressing the criticisms directed at the Endangered Species Act and, as a result, protecting the imperiled species it protects.

Another option to strengthen the Endangered Species Act's protections is to supplement the federal Endangered Species Act with state-level laws. While this approach would not preserve national unity of the Act's regulatory structure, state-level regulations can provide more targeted legislation that addresses local concerns. State governments are less restrained in how regulations can be implemented because they have broader regulatory power,²³ and can expand upon minimum standards set by the federal government.²⁴ Expanding protections for endangered species at the state-level is therefore the best approach in our current political and social climate.

The issue of protecting endangered species has been in and out of the public consciousness for over a century. However, recent events have made the issue particularly pertinent. The Trump administration has made several changes to the Endangered Species Act and the enforcement of other environmental regulations.²⁵ The threat that climate change poses to natural environments and the animals that inhabit them have become ever clearer.²⁶ Even iconic species such as the Monarch Butterfly have started to face population decline.²⁷ Given these events, it is more

²² BROOKINGS, *Tracking Deregulation in the Trump Era*, (Jan. 12, 2020), <https://www.brookings.edu/interactives/tracking-deregulation-in-the-trump-era/> [<https://perma.cc/9EYN-TKVD>].

²³ CORNELL LAW SCHOOL, *Police Powers*, WEX (2021), https://www.law.cornell.edu/wex/police_powers [<https://perma.cc/E22A-B6F6>].

²⁴ See BROOKINGS, *supra* note 22 (clarifying why many states may want to regulate higher than the federal floor).

²⁵ Jasmine Aguilera, *The Trump Administration's Changes to the Endangered Species Act Risks Pushing More Species to Extinction*, TIME (Aug. 14, 2019), <https://time.com/5651168/trump-endangered-species-act/> [<https://perma.cc/HZ6E-Y7CS>].

²⁶ WWF, *Animals Affected by Climate Change*, WORLD WILDLIFE MAG. (Fall 2015), <https://www.worldwildlife.org/magazine/issues/fall-2015/articles/animals-affected-by-climate-change> [<https://perma.cc/EUX8-JD3B>].

²⁷ *Id.*

important than ever to discuss how endangered species can best be protected before it is too late.

This Note will describe how Kentucky can change current state-level regulations to better protect the endangered species that live within its borders. This Note will discuss major portions of the Endangered Species Act, the process for listing a species as protected under the Act, the protections provided to a threatened or endangered species, and the flaws within the current federal scheme. The Note will also provide and analyze a few examples of states that have enacted their own Endangered Species Acts to compliment the federal Endangered Species Act. From here, Kentucky's current regulations concerning endangered species will be analyzed and this Note will conclude by providing a potential Endangered Species Act designed to address the concerns of Kentucky's residents as well as the particular threatened species that call the state home.

Kentucky should adopt a state-level Endangered Species Act to compensate for the weaknesses in the federal Endangered Species Act. The Act should specifically expand protections to species in limbo waiting for listing under the federal ESA and species that are in decline but not yet endangered. The current protection scheme under both federal law and Kentucky state law is insufficient to protect species that are threatened by human activities. Many states have already enacted their own versions of the Endangered Species Act, including California²⁸, Virginia²⁹, and Tennessee³⁰. Kentucky can learn from these states to construct an endangered species act that protects imperiled wildlife and protects the interests of landowners, and others, who would be impacted by the regulations the act would impose. Creating an endangered species act for Kentucky is the best way for the state to ensure that the state's wildlife is protected and continues to be a source of revenue and enjoyment for the state for generations to come.

²⁸ *CESA*, CAL. DEPT OF FISH & WILDLIFE, (2021) <https://wildlife.ca.gov/Conservation/CESA> [<https://perma.cc/L8UW-XAHU>].

²⁹ 4 VA. ADMIN. CODE § 15-20-130 (2021).

³⁰ *See* Nongame and Endangered or Threatened Wildlife Species Conservation Act of 1974, TENN. CODE. ANN. §§ 70-8-101–112 (Oct. 2020).

II. ENDANGERED SPECIES ACT: AN OVERVIEW

Like many pieces of environmental regulation, the Endangered Species Act is technical and complicated. However, there are four major components to the law.³¹ First, the activities which are prohibited that directly involve individuals in a protected species of wildlife.³² Second, the activities which are prohibited that indirectly impact species—these are protection for land use.³³ Third, the penalties that apply for violating the various sections of the Act,³⁴ and fourth, the exemptions to prohibited behavior that the Act allows.³⁵

The most important protection for endangered species is established in §9 of the Act. That section states:

Any endangered species of fish or wildlife listed pursuant to section 4 of this Act it is unlawful for any person subject to the jurisdiction of the United States to – (A) import any such species into, or export any such species from the United States; (B) take any such species within the United States or the territorial sea of the United States; (C) take any such species upon the high seas; (D) possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation of subparagraphs (B) and (C); (E) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species; (F) sell or offer for sale in interstate or foreign commerce any such species; or (G) violate any regulation pertaining to such species or to any threatened species of fish or wildlife listed pursuant to section 4 of this Act and promulgated by the Secretary pursuant to authority provided by this Act.³⁶

³¹ Hodges, *supra* note 1.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ Endangered Species Act, 16 U.S.C. § 1538 (2020).

This section is known as the “takings” clause.³⁷ Put simply, §9 mandates that endangered species have the right to be left alone in their proper habitats and that they must not be interfered with.³⁸

The second major section is the provision describing the protections given to “critical habitats.”³⁹ The Act defines critical habitats as:

- (1) Specific areas within the geographical area occupied by the species at the time of listing, if they contain physical or biological features essential to conservation, and those features may require special management considerations or protection; and
- (2) Specific areas outside the geographical area occupied by the species if the agency determines that the area itself is essential for conservation.⁴⁰

The protection of critical habitats is crucial for the recovery of endangered species.⁴¹ Without proper protection for their habitats, other conservation efforts, such as captive breeding programs, cannot be successful.⁴²

The Endangered Species Act provides several mechanisms for enforcement of the protections it creates. First, it provides for civil penalties for violating the provisions of the Act.⁴³ This penalty is up to \$25,000 for harms to wildlife and up to \$12,000 for harms to protected plant-life.⁴⁴ The Act also provides for criminal penalties which can rise to \$50,000 in fines and up to one year in prison, or even both.⁴⁵ The Act provides that only people who knowingly commit violations or are engaged in specific wildlife trades will face penalties.⁴⁶

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Kettman, *supra* note 18.

⁴³ Endangered Species Act, 16 U.S.C. § 1540 (2020).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

The final important section of the Endangered Species Act includes specific exemptions to the Act's protections.⁴⁷ The Act provides that a species may be exempted by the Endangered Species Committee if: it is an experimental population (members of an endangered or threatened species that are released outside of the species' current range to further conservation purposes); the species is involved in an incidental taking by federal actions; there are national security concerns; protection would result in undue hardship; or the species is involved in certain actions taken by Alaskan natives.⁴⁸

A. Listing a Species

For a species to receive protection under the Endangered Species Act, the species must be "listed" as endangered.⁴⁹ To "list" a species, a listing agency must determine that a species should be considered for listing or someone must submit a petition to one of the listing agencies.⁵⁰ The listing agencies include: the National Marine Fisheries Service of NOAA, the National Oceanic and Atmospheric Administration ("NOAA") in the U.S. Department of Commerce; and the Fish and Wildlife Service in the U.S. Department of the Interior.⁵¹ These agencies consider numerous factors in deciding whether a species should be listed, such as: the present or threatened destruction of habitat; overutilization of the species for commercial, recreational, or other purposes; disease or predation; inadequacy of existing regulatory mechanisms; and other natural or manmade factors affecting the continued existence of the species.⁵² If the previous factors are deemed to jeopardize the future of the species, listing the species as endangered is considered appropriate.⁵³ Importantly, economic

⁴⁷ Hodges, *supra* note 1.

⁴⁸ Endangered Species Act, 16 U.S.C. § 1539 (2020).

⁴⁹ NOAA, *Listing Species Under the Endangered Species Act*, (June 2, 2020), <https://www.fisheries.noaa.gov/national/endangered-species-conservation/listing-species-under-endangered-species-act> [<https://perma.cc/2H6C-5LZ3>].

⁵⁰ U.S. DEP'T OF JUSTICE, *Listing Species Under the ESA and Designating Critical Habitat*, (May 15, 2015), <https://www.justice.gov/enrd/listing-species-and-critical-habitats> [<https://perma.cc/2BLP-W2Q3>].

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Key Provisions of the Endangered Species Act*, ECOLOGY & SOC'Y, <https://www.ecologyandsociety.org/vol17/iss4/art28/table1.html> (last viewed Jan. 20, 2021) [<https://perma.cc/86FQ-H7UY>].

factors cannot be considered when deciding if a species should be listed.⁵⁴ The species may be listed as endangered, meaning the species is currently at risk of becoming extinct, or as threatened, meaning the species is likely to become endangered in the near future.⁵⁵

B. Protections for Different Classifications

The Endangered Species Act provides varying levels of protection triggered by the categorization of the species.⁵⁶ A species that is fully unlisted receives no protection under the Act, unless they are protected by state or local laws.⁵⁷ Unlisted species include species that are determined to not be facing any perceived risk of extinction and are considered common.⁵⁸ These species might also be organisms which are facing identified risks to their existence, but have pending petitions to be considered for the candidate list under the Endangered Species Act.⁵⁹

The next potential classification under the Endangered Species Act is a “Candidate Species.”⁶⁰ Candidate Species are species “for which the Fish and Wildlife Service (“Service”) has sufficient information on their biological status and threats to propose them as endangered or threatened under the Endangered Species Act (“ESA”), but for which development of a proposed listing regulation is precluded by other higher priority listing activities.”⁶¹ Prior to a 1995 amendment, the Endangered Species Act also permitted species to be listed as Candidate Species under

⁵⁴ U.S. DEPT OF JUSTICE, *supra* note 50.

⁵⁵ U.S. GEOLOGICAL SURV., *What are the differences between endangered and threatened species?*, https://www.usgs.gov/faqs/what-are-differences-between-endangered-threatened-imperiled-and-risk-species?qt-news_science_products=0#qt-news_science_products (last viewed Jan. 20, 2021) [<https://perma.cc/8MHV-95X4>].

⁵⁶ *Id.*

⁵⁷ U.S. FISH & WILDLIFE SERV., *Listing and Critical Habitat, Overview*, (June 10, 2020), <https://www.fws.gov/endangered/what-we-do/listing-overview.html> [<https://perma.cc/8XAR-7Q8F>].

⁵⁸ *Id.*

⁵⁹ U.S. FISH & WILDLIFE SERV., *Candidate Conservation, The Candidate Conservation Process* (June 10, 2020), <https://www.fws.gov/endangered/what-we-do/candidate-conservation-process.html> [<https://perma.cc/Y3NX-WUTP>].

⁶⁰ U.S. FISH & WILDLIFE SERV., *The Endangered Species Act and Candidate Species* (Sept. 2001), https://nctc.fws.gov/Pubs9/esa_cand01.pdf [<https://perma.cc/8SSA-3FDB>].

⁶¹ *Id.*

a special “category 2” designation.⁶² These species were species for which “information now in the possession of the FWS indicates that proposing to list as endangered or threatened is possibly appropriate, but for which persuasive evidence on biological vulnerability and threat are not currently available to support proposed rules.”⁶³ In other words, this special designation indicated there was some evidence that the species was in decline, but more information would need to be gathered before the decline could be fully determined. This classification no longer exists under the Endangered Species Act, but some state and local agencies maintain lists that were designed to serve a similar function.⁶⁴ Candidate species are not granted any statutory protection under the Endangered Species Act.⁶⁵ They are given a number from one to twelve to indicate their priority for listing under the Act.⁶⁶ Furthermore, the Fish and Wildlife Service encourages the development of partnerships and conservation plans for these candidate species, but the agency does not mandate any specific protections.⁶⁷

The final classification for protection under the Endangered Species Act is a “listed species”.⁶⁸ As stated above, species can be listed as either endangered or threatened depending on how severe of a threat to the continued existence of the species has been identified.⁶⁹ A species that is listed as endangered under the Act is automatically protected from “takings”, meaning these animals are protected from being killed or harassed, with few exceptions.⁷⁰ Threatened species are regulated under a separate section of the Endangered Species Act.⁷¹ Protections for threatened species are

⁶² U.S. FISH & WILDLIFE SERV., *Final Decision on Identification of Candidates for Listing as Endangered or Threatened* (Dec. 5, 1996), <https://www.fws.gov/endangered/laws-policies/policy-final-decision.html> [https://perma.cc/9NHX-4SXW].

⁶³ Howard M. Crystal, *The Elimination of the Category 2 Candidate Species List: A Prescription for Environmental Disaster*, UNIV. OF MICH. (1997), <http://www.umich.edu/~esupdate/library/97.01-02/crystal.html> [https://perma.cc/6XZY-3T3P].

⁶⁴ *Id.*

⁶⁵ U.S. FISH & WILDLIFE SERV., *supra* note 60.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Endangered Species Act, 16 U.S.C. § 1533 (2020).

⁶⁹ *Id.*

⁷⁰ NAT'L OCEANIC & ATMOSPHERIC ADMIN., *What is the difference between a threatened and an endangered species?*, (Apr. 22 2019) <https://oceanservice.noaa.gov/facts/endangered.html> [https://perma.cc/B46J-TKXQ].

⁷¹ *Id.*

called 4(d) protections.⁷² These protections can be as expansive as those given to endangered species, or they can be modified to be less restrictive by the Secretary of the Interior.⁷³

The Act also provides several other protections for listed species.⁷⁴ Species may also be protected under this section if the species is so visually similar to a listed species that protecting the listed species requires protecting the similar species as well.⁷⁵ The agency must also provide every listed species—endangered or threatened—with a recovery plan.⁷⁶ These plans are intended to promote population growth and remove the threats to the species' continued existence that prompted listing in the first place.⁷⁷ Additionally, the plans must prioritize the species facing the most severe threat of extinction and consider which species are most likely to benefit from the creation and implementation of a recovery plan.⁷⁸

There are few special protections for species which are delisted after their population numbers improve, frequently referred to as “recovered” or “delisted” species.⁷⁹ The Endangered Species Act states that once a species is delisted its population must be monitored for no fewer than five years.⁸⁰

C. Where the Protection Scheme Fails

The Endangered Species Act provides many important protections to wildlife facing extinction, but this protection scheme does have a few notable flaws. First, the Act doesn't adequately protect candidate species.⁸¹ Second, the act doesn't go far enough in protecting threatened species.⁸² Third, the ESA provides inadequate protection for species that have been classified as

⁷² Endangered Species Act, 16 U.S.C. § 1533(d) (2020).

⁷³ Endangered Species Act, 16 U.S.C. § 1533 (2020).

⁷⁴ *Id.*

⁷⁵ Endangered Species Act, 16 U.S.C. § 1533(e) (2020).

⁷⁶ Endangered Species Act, 16 U.S.C. § 1533(f) (2020).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ NOAA, *Delisting Species Under the Endangered Species Act*, <https://www.fisheries.noaa.gov/national/endangered-species-conservation/delisting-species-under-endangered-species-act> (last viewed Sept. 21, 2021), [https://perma.cc/QB2V-KETQ].

⁸⁰ *Id.*

⁸¹ *See* Kettman, *supra* note 18.

⁸² *Id.*

recovered and subsequently delisted.⁸³ Kentucky should address these three issues through the introduction of a state-level endangered species act to ensure the state's wildlife can continue to thrive.

As mentioned above, a candidate species is a species of organism that the agency has studied and determined is in decline, but has not yet been officially listed under the Endangered Species Act because there are other, higher priority regulations to implement.⁸⁴ These candidate species do not have any statutorily mandated protections.⁸⁵ This leaves candidate species that are in recognized peril in a regulatory limbo. There are no time limits specified for when a candidate species must be listed—sometimes the wait times are immense.⁸⁶ For example, the Dakota Skipper—a species of butterfly—remained on the candidate list from 1978–2015.⁸⁷ While this species successfully made it out of limbo and has begun its path to recovery, others have not been so lucky.⁸⁸ Forty species have gone extinct while on the candidate species list.⁸⁹ When creating a state-level version of the Endangered Species Act, Kentucky should recognize these failures and address candidate species protections, either by creating set timelines in which protections must be implemented, having certain protections attach as soon as a species is given candidate status, or a combination of both approaches.

The second flaw in the Endangered Species Act protection scheme is the Act's treatment of threatened species. The Act defines an endangered species as “any species which is in danger of extinction throughout all or a significant portion of its range” and a threatened species as a species that is “likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.”⁹⁰ In defining the terms this way, the Endangered Species Act recognizes the main difference between a threatened species and an endangered species is time,

⁸³ *Id.*

⁸⁴ U.S. FISH & WILDLIFE SERV., *supra* note 57.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ CTR. FOR BIOLOGICAL DIVERSITY, *Number of Species Waiting for Endangered Species Act Protection Drops to Historic Low* (Dec. 23 2015) https://www.biologicaldiversity.org/news/press_releases/2015/endangered-species-act-12-23-2015.html [<https://perma.cc/XVK7-MDPA>].

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Endangered Species Act, 16 U.S.C. § 1532 (2020).

as threatened species are caught earlier in their decline. To achieve the Act's goals of promoting species recovery, steps should be taken as early as possible to ensure the species does not continue its decline, as earlier interventions will have a greater likelihood of success. To better protect threatened species and promote their recovery, supplemental endangered species protection acts should treat a threatened species with the same level of care that the Act grants endangered species. This would mean including set protections for threatened species instead of leaving the protections open to the interpretation of the Secretary of the Interior to decide once the species has been listed and given threatened status.

The final portion of the Endangered Species Act's protection scheme that ought to be reformed in order to adequately protect wildlife is how the Act treats delisted species. It is an important achievement when a species's population is deemed stable enough to be delisted from the Endangered Species Act. Delisting means the agency no longer sees an immediate threat to the existence of the organism.⁹¹ Currently, the Endangered Species Act protects these species by requiring monitoring for a minimum of five years once they have been delisted.⁹² State law could supplement the Endangered Species Act to better protect recovered species by extending the monitoring period from five years to ten years, and implementing a transitional level of protection for delisted species. For example, continuing to prohibit intentional takings of recovered species but loosening restrictions for incidental takings for a trial period to ensure the species' population is truly stable before legal protection is completely removed. If these changes are implemented, the successes of the Endangered Species Act can be expanded and more species can be preserved for future generations to enjoy.

III. STATE MODELS FOR ENDANGERED SPECIES PROTECTION

Several states have recognized that protecting endangered species should be a legislative priority because the Endangered Species Act does not offer enough protection, leading them to adopt

⁹¹ U.S. FISH & WILDLIFE SERV., *Delisting a Species* (Aug. 2002), <https://www.fws.gov/pacific/ecoservices/endangered/classification/pdf/delisting.pdf> [perma.cc/DFJ7-7CSQ].

⁹² NOAA, *supra* note 79.

their own versions of the Endangered Species Act. These states offer examples of the steps Kentucky can take as it crafts its own endangered species act. States that have enacted these acts include California, Tennessee, Alabama, and Minnesota.⁹³ The next section of this Note will analyze the successes and failures of these laws and what lessons they can offer Kentucky.

A. California

California was one of the first states to implement its own endangered species act by adopting the California Endangered Species Act (“CESA”) in 1970.⁹⁴ The act has had two major rounds of amendments in 1984 and 1997, respectively.⁹⁵ Currently, 250 species of plants and animals are protected under the CESA.⁹⁶

The CESA uses many of the same regulatory tools as the ESA. Species are added to the list of protected species following a petitioning process that can be undertaken by groups of private citizens, educational organizations, or the California Department of Fish and Wildlife.⁹⁷ A species can be listed as either threatened or endangered and, once classified as either, the Act prohibits the “taking” of those species and provides habitat protection for them.⁹⁸ The act also attaches criminal and civil penalties to the taking—killing, hunting, capturing—of an endangered or threatened species. Under the CESA, someone who violates the act can be fined up to \$50,000 or sentenced to one year in jail.⁹⁹

However, there are important differences between the federal Endangered Species Act and the California Endangered Species Act which allow the CESA to address some of the flaws of the federal Act. The most important difference is that California addresses the problem of candidate species lingering in regulatory

⁹³ See Susan George & William J. Snape III, *Endangered Species Act, Laws, Policy, and Perspectives*, CTR. FOR BIOLOGICAL DIVERSITY (Donald C. Baur & WM. Robert Irwin eds., Am. Bar Ass’n 2d ed. 2010), <https://www.biologicaldiversity.org/publications/papers/StateEndangeredSpeciesActs.pdf> [<https://perma.cc/GF8N-L394>].

⁹⁴ CAL. DEP’T OF FISH & WILDLIFE, *CESA* (2021), <https://wildlife.ca.gov/Conservation/CESA> [<https://perma.cc/L8UW-XAHU>].

⁹⁵ *See id.*

⁹⁶ *Id.*

⁹⁷ *See id.*

⁹⁸ *See id.*

⁹⁹ California Endangered Species Act, CAL. FISH & GAME CODE § 12008.1 (2021).

limbo.¹⁰⁰ Under the CESA, once it has been determined that there is scientific evidence that the species is in decline and that intervention is necessary, the Act's protections become enforceable.¹⁰¹ This means that candidate species which have not been fully classified as endangered or threatened are still protected.

The second major difference between the CESA and the ESA is in the Acts' treatment of threatened species. Under the ESA, endangered and threatened species are afforded different regulatory protections; under the CESA, these species are given the same level of protection.¹⁰² This protection is temporary until a full hearing can be held and the California Department of Fish and Wildlife makes a decision to either list the species or deny expanded protection.¹⁰³

Although the CESA's protections for recovered and delisted species are not as expansive as the ESA's, it does offer broader protections for threatened and candidate species. These are important improvements that could be a useful model for an endangered species act adopted by Kentucky.

B. Tennessee

Another state that was an early adopter of state-level endangered species protections is Tennessee. Tennessee passed the Tennessee Nongame and Endangered or Threatened Wildlife Species Conservation Act (hereinafter, the "Tennessee Act") in 1974.¹⁰⁴ The stated purpose of the Tennessee Act was to "manage certain nongame wildlife to insure their perpetuation as members of ecosystems, for scientific purposes, and for human enjoyment."¹⁰⁵ The Act included many protections for endangered species and largely embraced the model of protection used in the federal Endangered Species Act.

¹⁰⁰ See CTR. FOR BIOLOGICAL DIVERSITY, *supra* note 87.

¹⁰¹ See *CESA to the Federal Endangered Species Act*, CAL. DEP'T OF FISH & WILDLIFE, (2021) <https://wildlife.ca.gov/Conservation/CESA/FESA> [<https://perma.cc/LT7M-S6QY>].

¹⁰² See *id.*

¹⁰³ *Id.*

¹⁰⁴ See Nongame and Endangered or Threatened Wildlife Species Conservation Act of 1974, TENN. CODE ANN. §§ 70-8-101–112 (Oct. 2020).

¹⁰⁵ *Id.*

The first important element of the Tennessee Act is how the act defines endangered species. The Tennessee Act defines endangered species as, “[a]ny species or subspecies of wildlife whose prospects of survival or recruitment within the state are in jeopardy or are likely within the foreseeable future to become so . . .”¹⁰⁶ This definition of endangered species is more expansive than the federal definition because it includes species that are likely to be in jeopardy in the foreseeable future, whereas the federal definition only includes the species which already are. Furthermore, the Tennessee Act defines “threatened species” as species which are likely to become endangered in the foreseeable future.¹⁰⁷ By expanding the definition of endangered to include soon-to-be-imperiled species and still protecting threatened species—those soon to be endangered—the Tennessee Act provides protection to more species earlier than the Endangered Species Act. This increases the likelihood of the species recovering within the state.

Another important protection for wildlife in the Tennessee Act is the creation of the “watchable wildlife endowment.” This endowment is a funding mechanism that ensures that endangered species protection programs receive adequate funding.¹⁰⁸ The fund is financed by donations and is protected from being co-opted for nonconservation related activities.¹⁰⁹ Adequate funding is a major issue for conservation programs, so the creation of these funding schemes can be useful promoting future recovery programs.

The Tennessee Act fails to address some of the issues that the Endangered Species Act has in its protection scheme. First, the Tennessee Act does not offer protection to candidate species or species during the listing process, meaning many species remain unprotected for an extended period of time even if they have been declared to be vulnerable to extinction. Second, the Act does not directly describe how recovery plans for endangered species should be structured.¹¹⁰ Instead, the Act states that critical habitats should be protected and that the taking of endangered or threatened species should be largely prohibited and strictly

¹⁰⁶ TENN. CODE ANN. § 70-8-103(3) (2020).

¹⁰⁷ U.S. FISH & WILDLIFE SERV. *Endangered Species Act Overview* (Jan. 30 2020), <https://www.fws.gov/endangered/laws-policies/> [https://perma.cc/6CK3-DJFW].

¹⁰⁸ TENN. CODE ANN. § 70-8-110(c) (2020).

¹⁰⁹ *See id.*

¹¹⁰ *See id.*

regulated through permits.¹¹¹ The Act also only extends protection to species of animals—it does not provide protection for endangered plant species.¹¹² Although the Tennessee endangered species protection scheme has its flaws, it is a useful model for the Kentucky legislature because it provides some improvements on the federal Endangered Species Act. Further, Tennessee and Kentucky share many environmental and sociological similarities, making the adoption of a similar law in Kentucky more politically feasible.¹¹³

C. Other Important State Lessons

Although there are many other states with their own Endangered Species Acts, two remaining states are particularly worth examining: Minnesota and Maine. The Minnesota Endangered Species Statute authorizes the Minnesota Department of Natural Resources to designate species as endangered, threatened, or species of special concern.¹¹⁴ The act has standard endangered species protections including the prohibition of takings of endangered or threatened species and permit requirements for activities that may result in the taking of these species.¹¹⁵ What sets the Minnesota Endangered Species Statute apart, however, is its protection “species of special concern.”¹¹⁶ A species of special concern is a species which “is not endangered or threatened” but is “extremely uncommon in Minnesota, or has unique or highly specific habitat requirements and deserves careful monitoring of its status.”¹¹⁷ Additionally, “[s]pecies on the periphery of their range which are not listed as threatened may be included in this category, along with those species that were once threatened or endangered but now have

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ See e.g., Levi Ismail, *TN, KY lawmakers draft bills to modernize struggling unemployment systems*, WTVF NEWSCHANNEL 5 NASHVILLE (Feb. 12, 2021), <https://www.newschannel5.com/rebound/tn-ky-lawmakers-draft-bills-to-modernize-struggling-unemployment-systems> (demonstrating how similar legal efforts can be implemented in both states) [perma.cc/3U4L-D3S7].

¹¹⁴ MINN. DEP’T OF NAT. RES., *Minnesota Endangered Species Law*, MDNR (2021), <https://www.dnr.state.mn.us/rsg/laws.html> [https://perma.cc/QA8R-RV8Q].

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ MINN. DEP’T OF NAT. RES., *Status Definitions*, MDNR (2021), <https://www.dnr.state.mn.us/rsg/definitions.html#:~:text=A%20species%20is%20considered%20a,careful%20monitoring%20of%20its%20status> [https://perma.cc/7WL7-GV6P].

increasing or protected, stable populations.”¹¹⁸ This classification helps address the flaw in the Endangered Species Act concerning species that are transitioning out of threatened or endangered status by offering them extended monitoring and protection. This provision goes a long way in preventing various species from falling through the cracks.

The other state law that deserves special consideration is the Maine Endangered Species Act.¹¹⁹ The most distinctive component of the Maine Act is the level of citizen involvement that the act encourages. The Act separates listing a species into two distinct steps.¹²⁰ The first step is determining a species' status: stable, endangered, or threatened.¹²¹ The second step is developing a conservation plan for that species.¹²² This step relies heavily on public involvement, as private landowners are heavily involved in the planning process.¹²³ The conservation plan also consults public environmental groups and tribal organizations to ensure a wide variety of public concerns are addressed.¹²⁴ Additionally, the Act encourages voluntary funding and allows the public to fund specific projects, from ocean life conservation to the preservation of bird species, through donations solicited through tax returns and property registration forms.¹²⁵ Heavy public involvement helps promote the success of the Act.

D. Kentucky Endangered Species Protection

Kentucky does not have a state-level endangered species act. This creates many problems for conservation within the state. These problems may be addressed by creating a Kentucky endangered species act like the state models described above. However, Kentucky does have some state-specific regulations designed to protect organisms living within the state. Evaluating

¹¹⁸ *Id.*

¹¹⁹ ME. DEP'T OF INLAND FISHERIES & WILDLIFE, *State Wildlife Action Plan*, IFW, <https://www.maine.gov/ifw/fish-wildlife/wildlife/wildlife-action-plan.html> [<https://perma.cc/K5XN-THBQ>].

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ ME. DEP'T OF INLAND FISHERIES & WILDLIFE, *State Wildlife Action Plan*, IFW, <https://www.maine.gov/ifw/fish-wildlife/wildlife/wildlife-action-plan.html> [<https://perma.cc/K5XN-THBQ>].

the strengths and weaknesses of these laws is an important first step to understanding how a Kentucky endangered species act should operate.

The first collection of Kentucky laws that provide protection to endangered species are KRS §§ 150.180, .183, .260, .280, .990.¹²⁶ These statutes prevent the import, transport, and possession for sale of any endangered species of wildlife.¹²⁷ The regulations define an endangered species as a species of wildlife that is “seriously threatened with worldwide extinction or in danger of being extirpated from the Commonwealth of Kentucky.”¹²⁸ Kentucky enforces these regulations by imposing fines, revoking licenses, and imprisoning violators if their violations are sufficiently severe.¹²⁹ These statutes provide some extended protections to endangered species by greatly restricting the wildlife trade within the state.¹³⁰ These protections supplement the federal Endangered Species Act, which protects habitats and prohibits the taking of endangered species. However, the Kentucky statute does not provide complete protection for endangered species within the state.

The other major action taken by Kentucky to protect endangered species is the state’s Wildlife Action Plan. This plan was made to satisfy federal requirements for wildlife conservation grants.¹³¹ The action plan includes eight components: first, the plan had to include data on the distribution and variety of wildlife;¹³² second, “[d]escriptions of locations and relative condition of key habitats and community types essential to conservation of species identified in the 1st element;”¹³³ third, a description of problems facing the species listed in the first component;¹³⁴ fourth, actions that may be required to protect threatened species;¹³⁵ fifth, plans for monitoring the species

¹²⁶ KY. REV. STAT. ANN. §§ 150.180–.990 (2021).

¹²⁷ *Id.*

¹²⁸ KY. REV. STAT. ANN. § 150.183 (2021).

¹²⁹ *Id.*

¹³⁰ *See id.*

¹³¹ KY. DEPT OF FISH & WILDLIFE, *Wildlife Action Plan*, FWS (2021), <https://fw.ky.gov/WAP/Pages/Wildlife-Action-Plan-Full.aspx#1.1.3> [https://perma.cc/UJR6-M97P].

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

identified as endangered;¹³⁶ sixth, plans to revise the monitoring procedures and actions to be taken;¹³⁷ seventh, “[d]escriptions of the plans for coordinating, to the extent feasible, the development, implementation, review, and revision of the Plan-Strategy with Federal, State, and local agencies and Indian tribes that manage significant land and water areas within the State or administer programs that significantly affect the conservation of identified species and habitats;”¹³⁸ eighth, descriptions of public involvement within the management plan.¹³⁹ All of these requirements are monitored by the Kentucky Department of Fish and Wildlife.¹⁴⁰

The Wildlife Action Plan helps protect species in several ways. Most importantly, the plan aggregates data on the state’s varied wildlife. It also recommends the creation of a variety of partnerships to implement conservation programs laid out in the plan. The major flaw with the Wildlife Action Plan is that it only provides recommendations to fish and wildlife professionals, meaning it lacks any real protections for endangered species.

Given the current regulatory scheme, the potential Kentucky Endangered Species Act should include the protections offered by the federal Act and additional components. The first three components should be directly tailored to address the failings of the federal Endangered Species Act. First, Kentucky should adopt the California model for protection of candidate species to prevent regulatory limbo.¹⁴¹ This would mean that once there is sufficient evidence to show a species is in decline, the protections against habitat destruction and takings would immediately go into effect. Only a showing that the species was not in decline could remove those protections.

Second, Kentucky should adopt Tennessee’s definition for endangered species, which includes “[a]ny species or subspecies of wildlife whose prospects of survival or recruitment within the state are in jeopardy or are likely within the foreseeable future to become so. . . .”¹⁴² Kentucky should also mirror Tennessee’s

¹³⁶ *Id.*

¹³⁷ KY. DEP’T OF FISH & WILDLIFE, *Wildlife Action Plan*, FWS (2021), <https://fw.ky.gov/WAP/Pages/Wildlife-Action-Plan-Full.aspx#1.1.3> [https://perma.cc/UJR6-M97P].

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *See id.*

¹⁴¹ *See* CAL. DEP’T OF FISH & WILDLIFE, *supra* note 94.

¹⁴² TENN. CODE ANN. § 70-8-103(3) (2020).

definition of threatened species, which includes those species likely to become endangered in the foreseeable future.¹⁴³ The Kentucky act should also provide threatened and endangered species the same level of protection to better encourage species recovery.

Third, a Kentucky endangered species act should adopt the Minnesota designation for “species of special concern” as a mechanism of protecting particularly fragile species and species that have recently recovered, granting those species added protection not permitted under the federal act.¹⁴⁴ This again would promote recovery of species and allow for rapid response if a species who had recovered began to decline again.

The final component a Kentucky Endangered Species Act should address what is likely to be a major criticism of the Act, the cost. To help reduce the impact additional endangered species protections, monitoring, and enforcement would incur, the state should adopt the voluntary funding mechanisms used in Maine and Tennessee to help support wildlife conservation.¹⁴⁵ The Tennessee model is particularly helpful as the state’s economy and ecology are fairly similar to Kentucky.¹⁴⁶ If these funding models were adopted, the budgetary impact of the act could be quite small.

CONCLUSION

In conclusion, the Endangered Species Act has played a major part in the recovery of a variety of wildlife species. The Act provides many important protections for species from prohibitions on takings of endangered and threatened species as well as permitting requirements to help promote habitat conservation and recovery plans that help monitor and support wildlife populations. However, the Act has several flaws. The most important of which include: candidate species remaining unprotected while waiting to be officially listed (some for many years while their populations continue to decline); threatened species not being offered adequate protections; and recovered species not being adequately monitored and protected once they have been officially delisted, which can

¹⁴³ TENN. CODE ANN. § 70-8-103(10) (2020).

¹⁴⁴ See MINN. DEP’T OF NAT. RES., *supra* note 114.

¹⁴⁵ ME. DEP’T OF INLAND FISHERIES & WILDLIFE, *supra* note 119; TENN. CODE ANN. § 70-8-110(c) (2020).

¹⁴⁶ See *e.g.*, Ismail, *supra* note 113 (demonstrating how similar legal efforts can be implemented in both states).

cause these species to return to endangered or threatened status following an initial recovery.

Given that the current political climate makes federal amendments or supplements to the Endangered Species Act unlikely, the best way for Kentucky to protect its vulnerable wildlife is to adopt an endangered species act of its own. To do this, Kentucky should look to the experiences of other states in creating their own species protection laws. Kentucky should specifically adopt the California model for protecting candidate species by granting these species immediate protection to prevent regulatory limbo. Kentucky should also adopt the more expansive Tennessee definitions of “threatened” and “endangered” to provide protection to more wildlife. Additionally, Kentucky should adopt the California’s equal protection of endangered and threatened wildlife. Next, the state should adopt “species of special concern” as Minnesota has done to ensure fragile or recently recovered species are adequately protected. Lastly, the Kentucky Act should adopt the voluntary funding schemes of Tennessee and Maine to help address budgetary concerns and ensure that the required conservation plans are financially possible. If the state adopts these regulations, it can ensure that vulnerable wildlife will recover, thrive, and be around to be enjoyed for generations to come.